(2)

Supreme Court, U.S.
FILED
MAR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1402

In The

Supreme Court of the United States

October Term, 1988

BERNARD J. FLAYAC,

Petitioner,

vs.

CRAIG HUMRICHOUSE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES J. CORBELLI
LILLICK & CHARLES
Two Embarcadero Center
San Francisco, CA 94111
(415) 984-8200

Attorneys for Respondents James G. Schwartz and Staley, Young & Schwartz, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14 pp

QUESTIONS PRESENTED

1. Whether Rule 50(a) of the Federal Rules of Civil Procedure should be interpreted to allow plaintiffs in diversity cases to take their case to the jury despite their failure to present a prima facie case under the governing state law.

2. Whether Petitioner should be allowed to raise for the first time in his Petition issues which were neither presented to nor resolved by the Court of Appeals.

LIST OF PARTIES

The parties to the proceedings are the Petitioner, BERNARD J. FLAYAC, Respondents JAMES G. SCHWARTZ and STALEY, YOUNG & SCHWARTZ, INC., HUGH WALKER, and HAINES, WALKER & SCOTT.

RULE 28.1 LISTING

Respondent Staley, Young & Schwartz, Inc. has no parent company, subsidiaries or affiliates.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES i

RULE 28.1 LISTING i

STATEMENT OF THE CASE 1

1. Nature of the Controversy 1

2. Proceedings Below 1

ARGUMENT 3

I

INTRODUCTION 3

II

THE ISSUES PRESENTED TO THIS COURT WERE NEITHER RAISED BEFORE NOR RESOLVED BY THE NINTH CIRCUIT 4

III

THE ASSERTED CONFLICT BETWEEN THE NINTH CIRCUIT AND THE EIGHTH CIRCUIT IS WHOLLY ILLUSORY 5

IV

PETITIONER'S STATISTICAL ARGUMENT IS AN ABSURDITY 8

V

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Adickes v. Kress & Co., 398 U.S. 144 (1970) 5

Dace v. ACF Industries, Inc., 772 F.2d 274 (8th Cir. 1983) 8

Delta Airlines, Inc. v. August, 450 U.S. 346 (1981) 5

Taylor v. Cochran, 830 F.2d 900 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 1476 (1988) 8

Youakim v. Miller, 425 U.S. 231 (1976) 5

TREATISES/OTHER AUTHORITIES

Annual Report of the Director of the Administrative Office of the United States Courts, 1987 9

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 5

STATEMENT OF THE CASE

1. Nature of the Controversy

Respondent James G. Schwartz is an attorney who practices general business law in Northern California. In 1984 Mr. Schwartz represented Petitioner in connection with an unsuccessful business venture. The facts and circumstances of the transaction and the nature of Mr. Schwartz's involvement are clearly and accurately described by the Court of Appeals in the opinion below, which description Respondents hereby adopt and incorporate for the sake of brevity.

In February, 1985 Petitioner filed suit against Respondents, alleging that under California law Mr. Schwartz was liable to Petitioner for professional negligence. Subject matter jurisdiction was based on diversity of citizenship. No substantive federal law was involved in the decision of Petitioner's case against Respondents.

2. Proceedings Below

The case was tried to a jury before the Federal District Court for the Northern District of California, Judge Charles A. Legge presiding. At the close of Petitioner's case in chief Judge Legge heard argument on Respondents' motion for a directed verdict and made the following rulings:

a) That the evidence presented by Petitioner regarding the preparation of an agreement by which Petitioner transferred $700,000 to the other parties to the transaction was sufficient to constitute a prima facie case of negligence;

b) That under the controlling California case law Mr. Schwartz could not be held liable for the preparation of a draft agreement which provided that an additional $635,000 was to remain in escrow until certain conditions were met, where the key provisions of the agreement were first modified by counsel for the other parties to the transaction and then eliminated altogether by Petitioner himself while Mr. Schwartz was vacationing in Hawaii;

c) That the value of Petitioner's pretrial settlement with the other parties to the transaction was to be measured, under California law, by the face value of the promissory note received rather than by its market value; and

d) That under California law Respondents were entitled to set off the benefits actually received by Petitioner as a result of the transaction.

The value of the setoffs allowed by the District Court equalled or exceeded any potential recovery at trial, and for that reason the parties stipulated to the entry of a directed verdict. Respondents' case was not presented to the jury.

The District Court's decision was affirmed in its entirety on appeal by the United States Court of Appeals for the Ninth Circuit. The questions presented by Petitioner to the Ninth Circuit concerned whether the evidence presented at trial stated a prima facie case of negligence under California law. The issue of whether the District Court improperly considered evidence presented by parties other than Petitioner was neither raised before nor decided by the Ninth Circuit; nor did Petitioner seek modification of the evidentiary standards enunciated in

Ninth Circuit precedent regarding motions for directed verdicts.

ARGUMENT

I

INTRODUCTION

This is a case of concern only to the litigants. It presents no compelling question of federal law and raises no issues of concern to the general public or to the federal judiciary. It is, quite simply, a common law negligence case that has received the studied consideration of two federal courts, each of which correctly concluded that Petitioner could not sustain his claim under California law.

Petitioner has gone to remarkable lengths in his attempt to create the illusion that on its very death bed this action suddenly has given birth to a significant question of federal law. Petitioner's request for further review of this case is based entirely upon two logically unrelated contentions. The first contention is that between 1970 and 1987 there was a discrepancy in the average number of cases reaching trial each year in the Eighth and Ninth Circuits. The second contention is that there is a conflict between those same circuits regarding the proper evidentiary standard to be employed in deciding motions for directed verdicts. Based on his pairing of these otherwise unrelated assertions, Petitioner invites the Court to speculate that there might be a relationship between the two phenomena, and that such relationship might have some

impact on the Seventh Amendment rights of litigants in the Ninth Circuit.

In fact, there is no conflict. This case would have been decided unfavorably to Petitioner in the Eighth Circuit, just as it was in the Ninth Circuit. Furthermore, if Petitioner truly believed he was denied a jury trial because the District Court applied an incorrect standard in granting Respondents' motion for a directed verdict, he would have raised the issue before the Ninth Circuit. He did not. In reality Petitioner seeks here only what he has sought for the past four years – the extension of liability under California law beyond its present boundaries. The artificial federal "issue" presented by the Petition is nothing but a facade intended to divert the Court's attention from the true nature of this case.

II

THE ISSUES PRESENTED TO THIS COURT WERE NEITHER RAISED BEFORE NOR RESOLVED BY THE NINTH CIRCUIT

During briefing and argument before the Ninth Circuit Petitioner did not dispute the evidentiary standard employed by the District Court in granting Respondent's motion for directed verdict. Petitioner did not suggest that the District Court erred in considering evidence presented by the defendants at trial. In fact Petitioner, in his opening brief before the Ninth Circuit, cited without question the very standard of which he now complains. Petitioner's failure to raise the issue below is of itself sufficient reason for denial of the Petition. Where a question raised in a petition for certiorari was not raised

before or considered by the Court of Appeals, the Supreme Court will not consider it in the absence of extraordinary circumstances. *E.g. Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). There are no extraordinary circumstances present in this case.

III

THE ASSERTED CONFLICT BETWEEN THE NINTH CIRCUIT AND THE EIGHTH CIRCUIT IS WHOLLY ILLUSORY

Petitioner asserts the existence of a conflict between the Ninth Circuit and the Eighth Circuit regarding the evidence to be considered on a motion for directed verdict. "Cases are properly regarded as conflicting if it can be said with confidence that another circuit would decide the case differently because of language in an opinion in a case having substantial factual similarity." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* at 374 (6th ed. 1986). There is nothing to suggest that the case against Respondents Schwartz and Staley, Young & Schwartz would have been decided any differently by the Eighth Circuit than it was by the Ninth Circuit, and there certainly is no factual similarity between this case and the Eighth Circuit cases cited by Petitioner.

Petitioner suggests that the Ninth Circuit relied on evidence presented by "the Humrichouse Defendants"[1]

[1] This suggestion is truly baffling, as the Humrichouse defendants settled with Petitioner prior to trial and were neither parties nor witnesses at trial.

and by Haines, Walker & Scott. He does not claim that either the Ninth Circuit or the District Court relied upon evidence presented by Respondent Schwartz. Furthermore, there is no indication in the Petition or in the Ninth Circuit's opinion below that evidence presented by anyone other than Petitioner was considered by either the Ninth Circuit or the District Court in ruling on the case against Respondents Schwartz and Staley, Young & Schwartz.

It is entirely unclear from the Petition what evidence Petitioner feels was improperly considered by the District Court and the Court of Appeals. The only actions of Respondents Schwartz and Staley, Young & Schwartz described in the Petition pertain to that portion of the case that the District Court ruled should be decided by the jury. The only other issue to which Petitioner could possibly be referring concerns the May 15, 1984 agreement by which Petitioner transferred $635,000 of his money to the other parties without his attorney's knowledge.

The facts upon which both the District Court and the Ninth Circuit based their conclusions that Respondents Schwartz and Staley, Young & Schwartz could not be held liable for the consequences of the May 15 agreement are quite simple, and have never been disputed by Petitioner. Mr. Schwartz prepared a draft agreement which provided that $635,000 of Petitioner's money was to remain in three escrow accounts until such time as each of three franchise transactions were ready to close. This draft was modified by counsel for the other parties to the transaction, who deleted certain prerequisites to closing. As modified, the agreement still required that the money remain in escrow. While Mr. Schwartz was vacationing in

Hawaii, and without his knowledge or approval, Petitioner and the other parties took the modified draft, deleted the requirement that the funds remain in escrow, and substituted a provision cancelling the escrow instructions. Petitioner personally withdrew his funds from the escrow accounts and endorsed the checks over to the other parties. At trial Petitioner claimed that under California law Respondent Schwartz was legally responsible for the consequences of Petitioner's actions, despite the fact that they were taken without Mr. Schwartz's knowledge.

Both Mr. Schwartz's draft agreement and the final signed agreement were discussed at trial by Petitioner during his case in chief. Petitioner testified that he initialled the revision cancelling the escrow account, that he signed the revised agreement, that he personally withdrew $635,000 from the escrow accounts, and that he personally signed the money over to the other parties to the transaction. None of this testimony was disputed. The sole question facing the District Court in considering this evidence was whether it stated a prima facie case of professional negligence under California law. The District Court correctly ruled that it did not, and the Ninth Circuit properly affirmed that ruling.

Petitioner relies entirely upon two Eighth Circuit cases to support his contention that this case would have been decided differently in the Eighth Circuit. Neither case bears any factual resemblance to the present case, and neither case offers support for Petitioner's contention.

Dace v. ACF Industries, Inc., 772 F.2d 274 (8th Cir. 1983), and *Taylor v. Cochran*, 830 F.2d 900 (8th Cir. 1987), *cert. denied* 108 S. Ct. 1476 (1988) are both federal civil rights cases involving claims of employment discrimination. In contrast to the present diversity case, evidence was presented to the jury in each case by both plaintiffs and defendants. In each case the District Court found that plaintiffs had established a prima facie case of discrimination, but then found that defendants' evidence of legitimate reasons for the actions complained of was overwhelming and rebutted plaintiffs' prima facie showing. The Eighth Circuit held that the question whether the prima facie case was rebutted, which required resolution of conflicting evidence, was properly one for the jury. *Dace*, 722 F.2d at 376-79 and nn. 3 & 6; *Taylor*, 830 F.2d at 902.

In the present case, defendants presented no evidence; the ruling of the District Court was based on Petitioner's failure to present a prima facie case of legal malpractice under the relevant California case law. There was no conflict in the evidence, and therefore no need for the District Court or the Ninth Circuit to reach the question decided in *Dace* and *Taylor*.

IV

PETITIONER'S STATISTICAL ARGUMENT IS AN ABSURDITY

Petitioner argues that a statistical imbalance between cases reaching trial in the Eighth and Ninth Circuits has created a procedural issue of sufficient import to justify devotion of this Court's scarce resources to its resolution.

Petitioner bases his contention on a supposed statistical imbalance in the average number of cases reaching trial in the Eighth and Ninth Circuits between the years 1970 and 1987. Petitioner boldly asserts that this imbalance is caused by the employment of differing evidentiary standards on directed verdicts, and concludes that his chances of reaching a jury would have been twice as good in the Eighth Circuit as it was in the Ninth Circuit.

Petitioner offers no explanation for his perplexing conclusion that an imbalance in the average number of cases proceeding to trial between 1970 and 1987 is attributable to an evidentiary standard first articulated by the Eighth Circuit in 1983. Petitioner's contention that there is a causal connection between the evidentiary standards governing directed verdicts and the statistical imbalance in the average number of cases reaching trial is likewise confounding. By definition, "a trial is considered to be a contested proceeding before a court or jury where evidence is introduced." *Annual Report of the Director of the Administrative Office of the United States Courts, 1987* at p.18.[2] The evidentiary standards discussed in the Petition clearly come into play only if evidence is introduced, which only occurs when in fact a case does go to trial. Petitioner either does not understand the nature of the statistics he has cited to the Court or he hopes the Court will be misled into viewing them as meaningful. In the context of this case, however, they are simply irrelevant.

---

[2] The Report does not discuss the number of cases brought to trial that actually reach a jury.

V

CONCLUSION

Respondent respectfully submits that the lengths Petitioner has been forced to stretch in order to create a federal "issue" demonstrate as forcefully and as eloquently as anything Respondents might add that the Petition is utterly lacking in merit and should be denied.

Dated: March 20, 1989

Respectfully submitted,

LILLICK & CHARLES

JAMES J. CORBELLI

Attorneys for Respondents
James G. Schwartz and Staley,
Young & Schwartz, Inc.